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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Fiduciary Rule Examination (RIN 1210-AB79)
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Re: Fiduciary Rule Examination

To Whom It May Concern:

Fi360, Inc. ("Fi360")[1] respectfully submits the following comments regarding the Department of Labor's ("DOL" or the "Department") proposed rule (the "Release") entitled "Definition of the Term 'Fiduciary.'" The Department has invited feedback on questions raised in the Feb. 3, 2017, Presidential Memorandum regarding market responses to the final Conflict of Interest Rule (the "Fiduciary Rule")[2] and its impact on industry participants and retirement investors.

Specifically, we respond to several of the Department's questions on which Fi360 is uniquely positioned to provide insight because of its fiduciary training and related consulting work with diverse business models providing investment advice under the Employee Retirement Income Security Act of 1974 ("ERISA") or otherwise preparing to act as fiduciaries under the final Rule.

Founded in 1999, Fi360 is a leading provider of training, education and certification programs to investment fiduciaries that advise or manage assets on behalf of pension, endowment, and other institutional or retail clients.

Fi360 believes that the Fiduciary Rule, while presenting significant compliance challenges for certain business models, aligns well with longstanding tenets of the common law of trusts as

[1] Founded in 1999, fi360's mission is to help financial intermediaries use prudent fiduciary practices to profitably gather, grow, and protect investors' assets. Fi360 manages the Accredited Investment Fiduciary® (AIF®), Accredited Investment Fiduciary Analyst® (AIFA®) and Professional Plan Consultant™ (PPC™) designation programs. At present, there are approximately 10,000 active AIF and AIFA designees. For more information, please visit http://www.fi360.com/.

[2] See "Definition of the Term 'Fiduciary'; Conflict of Interest Rule – Retirement Investment Advice," 29 C.F.R. 2509, 2510 and 2550, Apr. 8, 2016.

incorporated in the conference report to the original 1974 pension law.[3] More recently, the Department's updated interpretation of a functional fiduciary under ERISA was held by several federal district or appellate courts to be consistent with legislative intent.[4]

Fi360's comments rely in part on research metrics of an affiliated company. Ann Schleck & Co. publishes the *Advisor Fee Almanac* on an annual basis, which is used widely in the retirement services industry for its benchmarking tools. The *Almanac* contains numerous metrics and industry trends drawn from a database of approximately 900 full-time retirement specialists from 200 advisory firms serving more than 15,000 plan sponsors with a combined total of $380 billion in assets. The average qualified plan assets under advisement are $1.5 billion with a median asset base of $175 million.[5]

Our comments follow four questions, in the order presented, in sec. C. of the Release.

i. Do firms anticipate changes in consumer demand for investment advice and investment products? If so, what types of changes are anticipated, and how will firms respond?

Rising demand for objective advice – Fi360 anticipates increased demand for investment advice when the public can be assured that those who provide advice are accountable as fiduciaries.

Currently, the financial services industry suffers from generally low public trust, as evidenced by the most recent[6] Gallup poll. In a summary ranking of 22 professions, the two financial services occupations included in the list – stockbrokers and insurance agents – come in at numbers 16 and 20, respectively. Only 12 percent of survey respondents rated the honesty and ethics of stockbrokers as high or very high versus 37 percent low or very low. For insurance agents, the comparable values were 11 percent and 38 percent.

[3] The fiduciary section of ERISA "in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 93-533, p. 11 (1973).

[4] *See, e.g. a*dministrative challenges filed against the DOL Fiduciary Rule, *National Association for Fixed Annuities v. Perez,* 11/23/16, at https://assets.documentcloud.org/documents/3224894/NAFA-20161123.pdf; *Market Synergy Group v. U.S. Dep't. of Labor,* 11/28/16, at https://www.gpo.gov/fdsys/pkg/USCOURTS-ksd-5_16-cv-04083/pdf/USCOURTS-ksd-5_16-cv-04083-1.pdf; *U.S. Chamber of Commerce, et al, v. Hugler,* 2/8/17, at http://courthousenews.com/wp-content/uploads/2017/02/Adviser-Rule.pdf; and *Thrivent Financial for Lutherans v. Hugler,* 2/21/17, at https://assets.documentcloud.org/documents/3472998/Thrivent-Order-Minnesota.pdf.

[5] Ann Schleck & Co., *Advisor Fee Almanac*, 6th Ed., 2017, at 10-12.

[6] "Honesty/Ethics in Professions," Gallup, Dec. 7-11, 2016. *Available at* http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx.

This Gallup poll does not include "investment advisor" or "financial planner" as professions to be rated in the survey. Perhaps practitioners in these two professions would have rated higher because they generally (although not always) are regulated as fiduciaries versus stockbrokers and insurance agents, similar to the medical and engineering professions that ranked near or at the top.[7]. It seems likely that all four of these types of financial services practitioners suffer reputational damage by the lack of a fiduciary standard of conduct for those who provide personalized advice, and by the inability of the public to discern who is accountable as a fiduciary. Regulators generally have been lax in restricting job titles used by the industry suggesting a trust relationship with the exception of state regulations barring titles implying expertise in working with older Americans.[8]

Fi360 believes that the best way to increase public trust in financial services is to assure that, regardless of the type of firm involved, when personalized investment advice is rendered, the advice provider will be accountable under a fiduciary standard of care. Broker-dealers, insurance companies, investment advisory firms, and financial planning firms all perform valuable services. Some services are non-fiduciary, such as facilitating counterparty transactions or providing educational information. Other services are fiduciary, such as personalized advice or discretionary management.

Advice is a fiduciary function and trust is the most important factor in establishing and maintaining advisory relationships with clients. This fact was affirmed in a 2015 working paper by the Rand Corporation called "Trust and Financial Advice" by Jeremy Burke and Angela A. Hung. [9] This study was made possible by funding from the Employee Benefits Security Administration. The authors found that "financial trust is correlated with advice usage and likelihood of seeking advisory services."

The DOL Fiduciary Rule brings clarity to what constitutes fiduciary versus non-fiduciary communications and requires personalized investment advice to conform to fiduciary principles and practices. It will help assure that the public can reasonably expect objective, competent, and ethical retirement advice to be rendered. Fi360 believes that this will help raise the public trust in investment advisors and increase demand for advice over time.

[7] Nurses were ranked first in the Gallup poll, pharmacists second, medical doctors third, and dentists, fifth. *Id.* Clergy, who are often considered to be fiduciaries, were ranked eighth, while lawyers were ranked 13th.

[8] *See, e.g.,* "NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations," North American Securities Administrators Association, adopted Mar. 20, 2008. *Available at* *http://www.nasaa.org/wp-content/uploads/2011/07/3-Senior_Model_Rule_Adopted.pdf*.

[9] Jeremy Burke and Angela Hung, "Trust and Financial Advice," RAND Working Paper Series WR- 1075, Jan. 7, 2016. *Available at* SSRN: https://ssrn.com/abstract=2794247.

Rising demand for digital advice – Beginning around 2012, algorithmic digital advice offered by so-called robo-advisors began to capture meaningful market share and growth has been accelerating. One consulting firm predicts an increase in robo-advised assets from approximately $200 billion in 2016 to $2.2 trillion by 2020.[10] While the rise of robo-advice has taken place during the Fiduciary Rule rulemaking, the report attributed the growth of robo-advice to market factors and did not reference any impact of the Fiduciary Rule or other regulation.

The Fiduciary Rule does not provide any special exemption for robo-advice; however, many of today's robo-advisors are likely to benefit from the Rule because they generally offer level fees and low costs. Level fees avoid compensation conflicts that would require use of the Best Interest Contract Exemption (BICE). Low costs are often achieved through strong product due diligence processes that result in low management fees, the widespread use of exchange-traded funds ("ETFs"), passive investment strategies, and limited human interaction. Additionally, compliance costs for robo-advisors under the Fiduciary Rule would be less than firms relying on the Best Interest Contract Exemption ("BICE"). Robo-advisors would likely use the streamlined level-fee exemption for rollover advice, and in many instances, would have no need for other prohibited transaction exemptions.

Increasing use of digital technology by human advisors – Digital technology is increasingly being leveraged by human advisors to achieve operational efficiencies, routinize repetitive functions to assure quality control, and provide clients online access to account information and rudimentary investment management capabilities. Human advisors providing these digital capabilities can achieve many of the same benefits as robo-advisors and economically serve clients that have limited investable assets.

Technology can help firms comply with the Fiduciary Rule, manage costs, and improve access to investment advice. Thus, concerns expressed by some about increased costs or reduced access to advice are likely to be mitigated by new uses of technology.

Changing demand based upon both market factors and regulatory developments – Our comments about digital advice illustrate the complexity of any economic analysis that attributes negative or positive product or business model impacts solely to a single cause, such as the Fiduciary Rule. Unrelated market dynamics may contribute to or be primary drivers behind recent dramatic changes within the retirement services sector that have more to do with technology than regulation. For example, a recent *Wall Street Journal* article matter-of-factly noted that BlackRock's increased reliance on computer

[10] Teresa Epperson, *et al,* "Hype vs. Reality: The Coming Waves of 'Robo' Adoption," A.T. Kearney, 2015 Robo-Advisory Services Study, June 2015, at 26. Available at https://www.atkearney.com/documents/10192/7132014/Hype+vs.+Reality_The+Coming+Waves+of+Robo+Adoption.pdf/9667a470-7ce9-4659-a104-375e4144421d.

models for actively managed portfolios reflects a broader trend of "clients across the money-management industry [moving] hundreds of billions of dollars to lower-cost funds that track indexes, known as passive funds, instead of aiming to beat the market."[11]

In addition to dynamic market forces driving the growth of robo-advice, other notable examples include the steady decline in the sale of variable annuity products that began five years ago, punctuated by an earlier sharp drop during the 2008 recession.[12] Given the intensity of news coverage of the Fiduciary Rule in recent years, trade press headlines sometimes play up the Rule's impact while ignoring other factors.[13] The Department should use caution in reviewing commentary that offers only anecdotal narratives implying a direct correlation between the Rule and its impact on business models, products, or access to investment advice.

ii. Are firms making changes to their advisory services and/or to the pricing of those services? Are firms changing the means by which customers pay for advisory services and by which advisors are compensated?

The trade press and numerous financial media have reported widely on changes to advisory services and pricing of those services in response to the Fiduciary Rule. Fi360 notes that while major changes are underway that promise to transform the overall financial services marketplace, some of the changes will impact certain business models more than others. For example, broker-dealers that have operated in a regulatory structure designed to oversee counterparty transactions will need to make more changes to business practices than will RIA firms that have operated for many years in a fiduciary culture in which avoiding or managing conflicts of interest are paramount.

Fiduciary training. Since the debate over the cost of conflicted investment advice came to the forefront in 2010 with the first Fiduciary Rule proposal,[14] firms have increasingly engaged Fi360 to offer training in fiduciary best practices. With the increasing

[11] Sarah Krouse, "BlackRock Shake-Up Favors Computers Over Humans," *The Wall Street Journal*, Mar. 29, 2017, at 1.

[12] Per LIMRA Secure Retirement Institute, variable annuity sales have experienced five consecutive years of declines, with sales nearly $80 billion lower than at their peak in 2007. Brian Bossler, "Indexed annuity sales hurt by fiduciary rule: LIMRA SRI," *RetireUp,* March 9, 2017. Available at https://www.retireup.com/blog/indexed-annuity-sales-hurt-by-fiduciary-rule-limra-sri.

[13] *See, e.g.,* commentary by Todd Giesing, assistant research director, LIMRA SRI: "Aside from the DOL fiduciary rule, one of the factors driving VA sales declines has been a drop in sales of products with guaranteed living benefit riders." *Id.*

[14] *Supra* note 2.

awareness of the pending compliance deadlines of the Rule, training and the use of fiduciary tools has expanded greatly across firms.

At its core, fiduciary training emphasizes adherence to prudent processes in order to comply with ERISA's fiduciary duties of loyalty and prudence. As a result, advisors are already increasingly turning to standardized procedures in developing investment recommendations. Typical of these procedures are due diligence processes that require increased data collection and a much broader inquiry into an individual's financial situation, as well as a deeper analysis before recommendations and alternative strategies are developed and presented to the client. While acting as a fiduciary requires more time to develop investment recommendations, consumers benefit by having their savings more prudently managed, with an emphasis on fulling understanding and serving clients' best interests.

The fiduciary duties of loyalty and care are hallmarks of any profession and are central to the Fiduciary Rule. Loyalty requires fiduciaries to avoid or manage conflicts in a manner that serves clients' best interests and to receive no more than reasonable compensation. Care requires fiduciaries to reasonably consider information that is material to decision-making and act with the skill, prudence, diligence and good judgment of a professional.

The Fiduciary Rule is likely to accelerate a trend that began decades ago in which consumers now place a greater premium on holistic advice rather than for episodic, transactional advice oriented around the sale of a product. Because fiduciaries are required to operate in a transparent environment by disclosing conflicts and with the added obligation of being paid only reasonable, and not excessive, compensation, Fi360 believes that retirement investors will benefit significantly more under the Rule than under current regulatory structures that focus primarily on single product transactions.

Time spent servicing clients. The Department asks what changes firms are making to their advisory services. A related question worth asking is whether advisors track the time they spend servicing clients? Surprisingly, most pension advisors do not track their time.[15] Ann Schleck & Co.'s *Almanac* suggests that while only one-quarter of advisors track their time, many advisors cite the need to do so as a future priority. The 25 percent who report tracking their time has increased from 2012 when 18 percent reported tracking time spent servicing clients. Fi360 believes that this trend toward more tracking will accelerate as advisors who were not previously accountable as fiduciaries become fiduciaries under the Rule. And when fiduciary versus non-fiduciary services are more clearly differentiated, each can be priced properly. In the absence of

[15] *Almanac,* at 37.

clarity and transparency, clients may be paying too much for sales recommendations based upon the mistaken belief that what they are getting is objective, fiduciary advice.

Fiduciary advice demands more time and attention than is typically required in a sales transaction or other non-fiduciary activity. By tracking their time when formulating and providing professional advice, fiduciary advisors will be able to calculate the cost of performing those services and adjust their compensation accordingly.

The increase in time needed to develop, implement, and document prudent practices will likely lead to increased attention to time management. Greater attention to time management should improve practice management efficiency under a fiduciary standard, although it is unclear at this point what the net effect will be on advisor compensation.

For example, following specific steps in the process of providing rollover advice will increase consistency across branch offices, and using well-drafted investment policy statements ("IPS") will provide advisors and clients with clear guidelines on following prudent investment strategies. This is particularly helpful during periods of increased volatility when clients may panic and want to sell near the bottom of a market.

Over time, establishing consistent due diligence procedures firm-wide and across individual client accounts should improve practice management efficiencies, help clients avoid investment losses through a disciplined approach under an IPS, and help cultivate a much-desired 'client first' culture under fiduciary laws and regulations.

iii. Has implementation or anticipation of the rule led to increases or reductions in commissions, loads, or other fees? Have firms changed their minimum balance requirements for either commission or asset-based fee arrangements?

Changes in pricing. Fi360 believes that commissions and other forms of product-related compensation traditionally paid by broker-dealer firms to their representatives will be more transparent under the Fiduciary Rule. Greater transparency, coupled with more rigorous product due diligence, are likely to drive down product-related costs and variable compensation. The trade press generally refers to this as fee compression, which is part of a trend of overall product cost compression that has been happening for several years due to various factors, including the impending Fiduciary Rule.

While the *Almanac* this year noted a "modest increase" in advisor fees for small plans ranging in size from $1 million to $25 million in assets, with a one-year increase ranging between 2 percent to 4.7 percent last year in plans below $25 million in assets, and a 1 percent increase for plans of $25 million to $50 million. In contrast, there has been a continuing trend of fee compression for plans over $50 million during the same time-period, ranging from -4 percent for plans of approximately $100 million to -25.9 percent for plans of $400 million. The *Almanac* reports that the primary factors contributing to fee compression are heightened awareness of fiduciary best practices and the infusion of lower cost service models in the marketplace.[16]

It is also possible that highly publicized class action settlements in which excessive fees were a focal point have had an impact. As represented by *Almanac*'*s* most recent report, fee compression is happening in the larger plans, where plan sponsors may be more likely to take notice of class action suits.

With regard to commissions and account minimums, the trade press has reported extensively on significant changes across the industry that are favorable to investors through lower cost offerings and more transparent fee structures. Many of these new pricing structures, including new, uniform share-class offerings, will allow investors to make more informed choices as a result of growing uniformity among front-end load and 12b-1 trailing fees.[17]

iv. What changes have been made to investor education both in terms of access and content in response to the rule and PTEs, and to what extent have any changes helped or harmed investors?

The *Almanac* notes that the average number of participant meetings increases steadily as plan assets increase and that overall, the percentage of advisors including employee education as part of their annual retainer fee has increased since 2015.[18] Participant educating meeting topics range from retirement to financial literacy to more general sessions on financial wellness topics and employee benefits. We do not anticipate any substantive change in access or content, but rather size of plan will continue to drive frequency of meetings. We also believe that the number of advisors offering participant education will continue to increase as well, and will not be materially impacted by any changes to the Fiduciary Rule.

[16] *Id., at* 15.

[17] *See*, e.g., commentary that one major independent broker-dealer last year, in advance of the April 10, 2017, compliance deadline, was preparing to lower the total cost of financial advice by nearly 30 percent, and reduce account minimums from $15,000 to $10,000, as well as certain IRA maintenance fees. Janet Levaux, "LPL Cuts Prices, Account Minimums Ahead of DOL Fiduciary Rule, *Think Advisor*, Mar. 16, 2016. *Available at* http://www.thinkadvisor.com/2016/03/16/lpl-cuts-prices-account-minimums-ahead-of-dol-fidu. *See* also, industry commentary indicating the new class shares will "ultimately be a positive for investors." John Rekenthaler, "Lower-Cost T-Shares Coming to a Fund Near You," *Morningstar Advisor*, Jan. 6, 2017. *Available at* http://www.morningstar.com/advisor/t/118056663/lower-cost-t-shares-coming-to-a-fund-near-you.htm.

[18] *Almanac, at* 48.

Summary

The Department's initiative to update its fiduciary regulations addressing investment advice, in place for more than 40 years, is long overdue. In our view, this is really not so much a 'new' Rule but rather one that returns the standards for appropriate market conduct to ERISA basics rooted in the law of trusts, as we noted earlier. And, as noted throughout our comments, we suggest that any further analysis to the regulatory impact and costs to industry and investors should take into account marketplace developments that oftentimes overtake regulation and in this instance, have had a more significant impact on retirement costs and the access to advice than the Rule itself. We would be happy to answer any questions that the Department may have with respect to the information presented in this letter.

Very truly yours,

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